Supreme Court, U.S.
FILED
MAY 8 1995
CLERK

No - 94 - 1566

In The

Supreme Court of the United States

October Term, 199_

Ralph P. Forbes,

Petitioner

vs.

AETN-TV, KHOG-TV, *et al.*,

Respondents

On Petition for Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit

PETITIONER's SUPPLEMENTAL BRIEF

Ralph P. Forbes,
Citizen In His Own Proper Person
Box 88
London AR 72847
501/293-4641

10 pp

TABLE OF CONTENTS

Page

NEW FCC OPINION, PART I* ..... *i*

NEW FCC OPINION, PART II* ..... *i*

UNCONSTITUTIONAL BURDENS ii

CLASSIC CASE OF VIEWPOINT PROHIBITION iii

EXPOSITION OF THE LAW iv

FCC REVERSES SUPREME COURT *AGAIN* iv

JEFFERSON CENSORED vi

"PRETEXT" THE CHILDREN iv

"REICHSTAG FIRE" vii

CONCLUSION viii

**Memorandum Opinion and Order*, FCC 94-249

Ten Copies Lodged with Clerk of Court

On November 22, 1994, the FCC released its *Memorandum Opinion and Order*, FCC 94-249 to two applications for review: [1] the F.C.C. *Pepper Letter*, 7 FCC Rcd 5599 21 August, 1992, 8210-AJZ/MJM cited in Appendices at 45a, 65a, 67a, 76a, 78a, 91a, 179a, 210a; and [2] the F.C.C. *Becker Letter*, October 30, 1992, DA 92-1503 cited in Petition at 4 & 5; App. 48a, 144a, 145a, 177a, 178a, 179a, 180a, 185a, 187a. This FCC opinion supports granting of certiorari for each and all of the following reasons.

The Commission correctly found that the *Becker* ads were not indecent. (pp 1 ~ 8, ¶1 ~ 12)

Forbes' ads were quite different from Becker's; and prior to the KHOG defendants' censorship of Forbes' ad, Forbes' materials were specifically found not to be indecent by the FCC .

After two years the FCC has ruled in effect that even *if* Forbes' ads were the same as Becker's they could not be censored or banned on grounds of indecency.[1]

* * *

However, the second part of the FCC opinion, FCC 94-249 (pp 8 ~ 12, ¶13 ~ 25), is a frightening exhibit that the unconstitutional camel's nose is now in the tent, and it's pushing hard to evict and supplant the rightful tenant. Petitioner's Cassandra-like forewarning is coming to pass. {Petition at 27 ~ 30, 153a ~ 159a and *passim*.}

Lurking amidst the tangle of high sounding pettifoggeries and obfuscating bureaucratese of the FCC opinion, the steel jawed traps of tyranny and slavery lay waiting for their disarmed prey, the American people stripped of their First Amendment shield and sword.

Licensees may, says the FCC, consider "the potential impact of political advertisements on their audience in making access decisions."[2] (¶15)

---

[1] Moreover, even if Forbes ads were "obscene" and subject to "channeling" to so-called "safe-harbor" hours, KHOG violated Forbes' rights by "channeling" them after 11 p.m., denying him "reasonable access to prime time when access to voters is greatest." App. 78a, P/ 28; FCC 94-249, p 2, n. 4, affirming *Pepper*, App. 47a.

[2] "Access decisions" and "channelling" are insidious euphemisms for censorship, hiding the ugliness of censorship behind these terms makes it no more palatable than a terrorist calling his victims "collateral damage."

This "potential impact" test is precisely the kind of unconstitutional subjective, arbitrary, capricious, overbroad trial that opens the flood gates to unconstitutional burdens and constraints against free expression.

In the instant case, even before this latest atrocious affront against free expression, the respondents considered Forbes' ad would have a powerful, effective impact on the audience, and that is *why* they censored it ... under color of a transparent pretext and patently false claim the ad was "obscene" on the "reasonable, good faith," "expert" "judgment" of the broadcaster.

The FCC opinion says "political advertisements containing graphic abortion imagery" are subject to censorship by a "reasonable, good faith judgment of the broadcaster." (¶18)

This burdening of "graphic abortion imagery" by the FCC hanging a Damoclean sword of censorship over the heads of candidates and placing the knife with thinly veiled instructions to cut the thread in the hands of broadcasters is unconstitutional because:

(1) The government is:

(A) Selecting which issues may be debated;

(B) Tying the hands, gagging the *symbolic* speech and abridging the expression of the Petitioner and Millions of other Americans (App. 225a, 226a);

And (C) Purporting to grant private licensees the power to censor under guise of cloak of government regulation.

WDAY, 360 U.S. 525, 79 S.Ct. 1302 (1959)

(2) The FCC ruling discriminates among candidates based on the subject matter of their expression and is therefore also violative of the Equal Protection Clause. *Mosley*, 92 S.Ct. at 2290 (1972)

(3) The FCC ruling claims to be "neutral" in classifying subject matter as subject to restrictions, but it *de facto* discriminates against a particular viewpoint; in favor of the opposing viewpoint.[3]

[3] Why are some allowed to express themselves by burning flags or desecrating symbols of intrinsic patriotic, cultural or religious values; but Petitioner and other Pro-Life candidates are barred by governmental rules from showing what they and their opponents agree are unanswerable arguments? Can their be any other conclusion but that the government is unlawfully discriminating against them to suppress their viewpoint? Millions think not. Petitioner is coming to this Court because he believes our constitutional rule of law works.

"Although the scope of the prohibition was phrased in general terms and applied to a selected group of speakers, it was obviously directed at spokesmen for a particular point of view ... It was a classic case of viewpoint-based prohibition."

Consolidated Edison Co. v. Public Service Comm'n of N.Y., 447 U.S. 530, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980)

The FCC pretends to wash its hands by the meaningless disclaimer that a licensee who "channels," *ie., censors* political ads "containing graphic abortion imagery cannot do so out of disagreement with candidate's political position." It is hard to imagine someone who is "pro-choice" using "graphic abortion imagery" to promote their position. This form of censorship takes aim solely at the Pro-Life position. To say that censorship is permissible as long as the censor purports it is not motivated "out of disagreement with candidate's political position" is the "logical" equivalent of saying that a terrorist who "lights a fuse and runs" cannot do it if his intention is to explode a bomb," but he may do so if he says he has "good motives."

"As Justice STEVENS observed in *Consolidated Edison Co. v. Public Service Comm'n. of N.Y.*, 447 U.S. 530, 100 S.CT. 2326, 65 L.Ed.2d 319 (1980), however: 'A regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a "law ... abridging the freedom of speech, or of the press." A regulation that denies one group of persons the right to address a selected audience on "controversial issues of public policy" is plainly such a regulation.' *Id.*, at 546, 100 S.Ct., at 2333-2334 ... '[t]he First Amendment's hostility to content based regulation extends not only to restrictions on certain viewpoints, but also to prohibition of public discussion of an entire topic, *id.*, at 537, 100 S.Ct., at 2333, we must be particularly wary in assessing (restrictions of speech) to determine whether it reflects an impermissible attempt 'to allow a government [to] control ... the search for political truth.' *Id.*, at 538, 100 S.Ct., at 2333." *FCC v. League of Women Voters of California*, 104 S.Ct. at 3119-3120

Today it is candidates whose views are expressed by what the FCC calls "graphic abortion imagery" who are subject to censorship."

Tomorrow will it be those who espouse free trade? Or those who advocate protection? Those who want to cut the budget? Or

those who want to raise taxes? Those who want to intervene in --- ? Or those who want peace?

Or will the voice that is silenced be the one that warns we have "made government into God and the people into slaves, we have come to a crisis of self-government in America. We have come to a parting of the ways. Down one road lies a totalitarian, utopian vision of freedom lost. Down the other lies lies the founders' vision of self-government regained - and we stand now to choose.

"But do you know what the issues shall be that determine our choice? They shall not be the issues of whether the budget is big or small; they will not be the issue of whether taxes are cut or raised, though these issues are important. They shall be the issues of how we understand our freedom. Is it something we can abuse in any way we choose even at the expense of our dearest principles? Or is it something we must wield with respect for what the founders laid down at the beginning and what no one likes to talk about any more: the laws of nature and nature's God?

"They did not set this country on a course that said, 'We worship our freedom.' They set it on a course that said, 'We worship our God and He gives us our freedom.' "It's time we remembered that."

Alan Keyes, Republican presidential candidate

Petitioner respectfully points out that one of the cases that supports his position was split, but the dissent in *Carey v. Brown*, 447 U.S. at 473, 100 S. Ct. at 2297 (1980) was less with the exposition of the law than with the accuracy of the paraphrasing and selective quotations. The exposition of the law therefore supports Petitioner, but in this case it is the FCC that has based its opinion on illogical distorted paraphrasing and selective quotations.

For example, the FCC opinion misinterprets *Kennedy* (¶22), which was arguably a *bona fide* news exemption case (App. 7a, n. 2) making the equal opportunities right inapplicable. It has nothing to do with the unequivocal prohibition against licensees censoring political expression. The FCC opinion misuses *Kennedy* irrelevantly to make the Orwellian double-speak claim that because the right of the public is paramount, that right is preposterously served, not by providing the people with uncensored access to alternative viewpoints(!); but ludicrously, by "protecting" the people from seeing or hearing ideas the FCC sanctified broadcasters don't think they should know(!). (App. 147a)

The FCC opinion (¶24) reverses the clear intent and language

of the unanimous Court in *WDAY* to claim it means the exact opposite of what the Congress and this Court has said. (*Petition*, 8~10) The FCC opinion says in essence censorship isn't censorship, so long as the FCC says the licensees may censor political speech. The FCC now claims the power to give the licensee the color of authority to censor and muzzle by prior restraint as long as everyone crosses their fingers and repeats Simon says censorship isn't censorship.[4]

The FCC opinion fallaciously asserts *47 USC 315* "relies in the first instance on the good faith discretion of private broadcasting licensees." (¶23) To the contrary of this schizophrenic sophistry, the Act was enacted in 1927 because Congress knew, and for most of its history the FCC agreed, it was folly to rely on the good faith discretion of private broadcasters. (App. 148a~150a) That is why the act forbids them to censor political speech. That is why this Court declared the FCC could not censor, nor could private broadcasters, nor could the FCC provide a cloak. (*Petition* 8 ~ 10)

When Congress and the FCC enforced the equal opportunity and no censorship provisions of *47 USC 315* they created limited forum for a specific purpose for the benefit of all candidates and the public. The FCC opinion has foreclosed the unabridged, equal right of petitioner and those who espouse his viewpoint from that forum.

Limiting expression and its parameters to a privileged caste of *nomenklatura* as the virtual surrealism of the FCC ruling proposes to do only leads to cynicism and alienation of the "channeled" people from the self-anointed elite:

"Shock among media pundits when (tabu or forbidden issues become) part of a public debate about public policy speaks volumes about a mindset that thinks it should decide what issues others dare to talk about." Dr. Thomas Sowell, senior fellow at Hoover Institution, Stanford University, April 30, 1995

---

[4] Reading Part II of the FCC Opinion 94-249, certain scriptures come to mind paralleling FCC faithfulness to the First Amendment, including:

For there is no faithfulness in their mouth; their inward part is very wickedness; their throat is an open sepulchre; they flatter with their tongue.

Psalms 5:9 & 140:3;

And, "Then the Lord said, 'Because this people draw near with their words And honor Me with their lip service, But they remove their hearts far from Me, And their reverence for Me consists of tradition learned [by rote,]'"

Isaiah 29:13 (NASB)

A pseudo-politically "correct" ambience engendered by a media elite that has no comprehension nor love for our venerable roots has spawned such an abysmal ignorance of our constitutional heritage that during the 1976 bicentennial large numbers of College students refused to sign petitions that were direct quotes from the *Declaration of Independence* because they deemed the words to be "radical," "militant," "subversive," "un-American," etc.

In such an atmosphere could Patrick Henry, Samuel Adams, Thomas Paine, James Madison or even Thomas Jefferson succeed in having their views expressed uncensored by FCC sanctioned broadcasters? Sadly the answer is probably not.

The respondents, with FCC support, have already censored Thomas Jefferson. (App. 53a)

Hiding behind the subterfuge of Orwellian slogans, covered by the noise of clanging brass and noisome lip service to First Amendment principles lies the masked terrorist threat against free speech, armed with "good faith" shields and cunning cudgels mislabeled under the pretext: "protect the children."

"Protect" the children? By robbing them of their First Amendment heritage!

It is true that photographs of babies who have been the victims of abortion are painful to look upon. And it is also agonizing and heartbreaking to see the victims of wars, persecution, crime, accidents, natural disasters or terrorism: whether in Lebanon, Jerusalem, Cambodia, Londonderry, London, New York City or Oklahoma City.

There is no doubt that children (and adults) were greatly disturbed by the poignant picture of the Oklahoma City fireman carrying the maimed body of a small child. Yet, there was no "channeling" of all the horrifying pictures and news of that terrible tragedy.[5-A]

[5-A] Would a court uphold a rule that forbade any reports of the tragic story of a woman who admitted drowning her two small sons? Surely a case could be made that hearing that horror story could traumatically undermine a small child's trust in the bedrock security of maternal love. And it may be argued that children are exposed to the idea of abortion, and that the knowledge that there are those who oppose it would be comforting and assuring, as opposed to thinking that all of society was totally heartless and devoid of natural affection, so that human life, especially small human life had little or no value.

It was a blessing that news of this terrible tragedy was not suppressed. In fact the image of that child, those children, united the American people in their compassion for the victims and indignation and contempt for the evil coward(s) who committed that abominable crime. If the news had been blacked out isn't it possible a major suspect would have been let loose? Would potential victims be deprived of fair warning? Or would rumours and panic result from distorted grapevine communications? Clearly freedom of the press disseminating accurate news, showing the heroism and sacrifice of volunteers, was a silver lining in a very dark sky.

Conversely, history has shown that a traumatic tragedy can like a "Reichstag fire" be used by those in power to justify a restriction on liberties, the disenfranchisement, suppression and persecution of dissidents and political opponents. A truly Free Press and a Court and a People vigilantly aroused at the slightest encroachment or censorship under any guise or euphemism, no matter how small or apparently benign is our first line of defense against such foul attempts at tyranny. (App. 98a; 235a).

And if such a despotism were ever established it would entrench itself by controlling and censoring all expression. Eventually, it would destroy itself whether in a bang or a whimper; but at what price? How much better to sound a clear trumpet now, censorship in whatever cloak, form or disguise will not be tolerated in the United States of America.

"Government is not reason; it is not eloquence; it is force! Like fire, it is a dangerous servant and a fearful master."

George Washington

Recently, in its its frantic zeal to "do something" to "fight crime" an overzealous congress almost passed legislation purporting to have authority to repeal the 4th Amendment *verbatim*.

5-B There has been little or no censorship of the news concerning: the mass murders and genocide in Rwanda, Bosnia, Chechnya, the starving children in Somalia, Haiti, etc.; the destruction of WW-II; Kent state; the Vietnam war to name just a few events recently shown with disturbing "graphic imagery." But because of the brutal truth of starving children, many were fed and many lives were saved and improved. Only those who would want war, or death camps, or open warfare in our streets would want to censor the bitter reality of such atrocities.

To protect us from our own passions and follies, is that not why we have the independent Courts?

There may be some on the Court who disagree, perhaps greatly, with the Pro-Life views of the petitioner; but if this be so, is that not all the more reason to affirmatively protect the infringed speech in this case?

"I disapprove of what you say, but I will defend to the death your right to say it." Voltaire (Francois Marie Arouet), Attributed

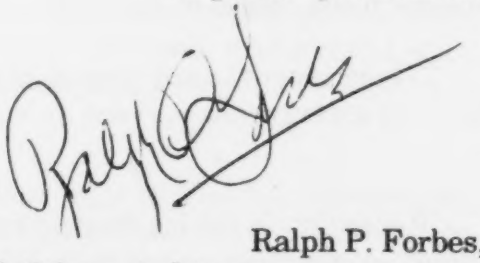
"If there is any is any principle in the Constitution that more imperatively calls for attachment than any other it is the principle of free thought ~ not free thought for those who agree with us but freedom for the thought that we hate."

Justice Oliver Wendell HOLMES, Jr.
United States v. Schwimmer, 279 U.S. 644 at 653 (1928)
App. 87a and *passim.*

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted



Ralph P. Forbes,
Petitioner in his own proper person